



September 25, 2015

The Honorable Tani Cantil-Sakauye, Chief Justice, and Honorable Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102-4783

Re: Letter in Opposition to Petition for Review
Newark Unified School District v. Superior Court (Brazil), Case No. S229112
After the Published Opinion in Court of Appeal, First Appellate District,
Case No. A142963, published July 31, 2015
Alameda County Superior Court, Case No. RG14738281

RECEIVED

SEP 28 2015

CLERK SUPREME COURT

Dear Chief Justice Cantil-Sakauye and Associate Justices:

Pursuant to the California Rules of Court, Rule 8.500, subdivision (g), the California School Boards Association (“CSBA”) through its Education Legal Alliance (“ELA”) submits this amicus letter in opposition to the Petition for Review (“Petition”) with regard to the July 31, 2015 decision in the above-referenced case, *Newark Unified School District v. Superior Court* (2015) 239 Cal.App.4th 33 (“Court of Appeal decision”).

CSBA is a non-profit corporation duly formed and validly existing under the laws of the State of California. CSBA is a member-driven association composed of the governing boards of almost all 1,000 K-12 school districts and county offices of education (“COEs”) throughout California. The ELA, which is composed of more than 725 CSBA members, is dedicated to addressing public education legal issues of statewide concern to districts and COEs and to their students. The purpose of the ELA is to protect the interests of its members in matters before the courts.

The ELA strongly opposes the Petition. The Court of Appeal decision that the inadvertent disclosure of documents covered by the attorney-client privilege does not waive the privilege is sound and should not be disturbed.

At issue in this case is the need to harmonize certain statutes. While the Public Records Act (“PRA”) generally requires disclosure of public documents, Government Code section 6254, subdivision (k), exempts from disclosure those “[r]ecords, the disclosure of which is exempted or prohibited pursuant to . . . [the] provisions of the Evidence Code relating to privilege.” The courts have clearly interpreted Evidence Code section 912 to hold that the attorney-client privilege is not waived because of “accidental, inadvertent disclosure of privileged information” such as occurred in this case. (*State Comp. Ins. Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 644, 654.)

At the same time, however, Government Code 6254.5, in relevant part, states that “whenever a . . . local agency discloses a public record which is otherwise exempt from this chapter, to any member of the public, this disclosure shall constitute a waiver of the exemptions specified in Section[] 6254 . . . or other similar provisions of law.”

The courts have made clear that the inadvertent disclosure of documents does not waive the privilege. (*WPS, supra*, 70 Cal.App.4th at p. 654.) This holding is incorporated into the PRA through the language of Government Code section 6254, subdivision (k), by reference to the “provisions of the Evidence Code relating to privilege.” Evidence Code section 912 is such a provision. While the Legislature initially added Government Code section 6254 prior to the appellate court’s ruling in *WPS*, the Legislature has amended it more than a dozen times since *WPS* without substantively modifying its language.

Moreover, the general language of Government Code section 6254.5 cannot and should not undo the privilege established through Government Code section 6254, subdivision (k). Government Code section 6254.5 was promulgated to correct something altogether different – i.e., “selective disclosure.” Indeed, to give full effect to the PRA, it makes sense to disallow selectively disclosing documents to some and not to others; it does not make sense to require disclosure of otherwise privileged documents that were inadvertently disclosed.

A contrary decision will cause undue hardship on school districts and other public agencies. A privilege so easily waived will have a chilling effect on the willingness of governing board members and officials of school districts and COEs to communicate frankly with their attorneys, which will make legal representation of school districts and COEs more difficult. Additionally, in order to avoid inadvertent waiver of attorney-client privilege, school districts will be forced to have attorneys handle PRA requests, thereby significantly raising the cost of operations. While large districts may have in-house counsel that can provide this service cost-effectively, the financial impact on smaller school districts will be significant. There are more than 75 school districts in California with annual operating budgets of less than \$1 million and more than 300 school districts in California with annual operating budgets of less than \$5 million. The financial impact on these districts of having attorneys handle all PRA requests would be considerable, with the loss of funding directly impacting the ability of those districts to meet the educational needs of their students.

Finally, *Ardon v. City of Los Angeles* has already been fully briefed before this Court. A decision in that case, if it is at odds with the Court of Appeal’s decision, will have to be applied to *Newark* anyway. Thus, entertaining a review, even a “grant and hold,” would be uneconomical and inefficient.

For the reasons stated above, the ELA respectfully requests that the Court deny the Petition and allow the Court of Appeal decision to stand.

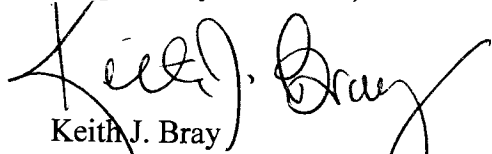
//
//
//

Honorable Chief Justice and Associate Justices

September 25, 2015

Page 3

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Keith J. Bray". The signature is written in a cursive style with a large, sweeping initial "K".

Keith J. Bray

Director, Education Legal Alliance

General Counsel, California School Boards Association

State Bar No. 128002

cc: Parties of Record (See attached Proof of Service)

PROOF OF SERVICE

I am employed in the County of Yolo, California. I am over the age of 18 years and not a party to this action. My business address is CSBA/Education Legal Alliance, 3251 Beacon Boulevard, West Sacramento, CA 95691.

On September 28, 2015, I served the following document(s):

Letter in Opposition to Petition for Review: Newark Unified School District v. Superior Court (Brazil), Case No. S229112; After the Published Opinion in Court of Appeal, First Appellate District, Div. 1, Case No. A142963, published July 31, 2015; Alameda County Superior Court No. RG14738281

- (BY MAIL) I caused a copy of said document to be placed in a sealed envelope, and placed the same with the firm's mailing room personnel for mailing in the United States mail at Elk Grove, California in accordance with CSBA's ordinary practices, and addressed to the interested parties below:
- (BY PERSONAL SERVICE) I caused a copy of said document to be hand delivered to the interested parties at:
- (BY FACSIMILE) I caused a copy of said document to be sent via facsimile transmission to the interested parties at:
- (BY OVERNIGHT MAIL) I caused a copy of said document to be sent via overnight mail to the parties listed below:

Paul Nicholas Boylan, Esq.
P.O. Box 719
Davis, CA 95617
Attorney for Petitioner/Real Party in Interest, Elizabeth Brazil

Jennifer R. Snyder
39675 Cedar Boulevard, Suite 250
Newark, CA 94560
Real Party in Interest

Sloan R. Simmons, Esq.
Jerome Marc Behrens, Esq.
LOZANO SMITH LLP
2001 North Main Street, Suite 650
Walnut Creek, CA 94596
Attorneys for Plaintiff/Respondent, Newark Unified School District

Honorable Evelio M. Grillo
Alameda County Superior Court,
Dept. 14, Administration Bldg.
1221 Oak Street
Oakland, CA 94612

Clerk of the Court
California Court of Appeal
First District, Division 1
350 McAllister Street,
San Francisco, CA 94102

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on September 28, 2015 in West Sacramento, California.


Anita Ceballos